Supreme Court, U.S.
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No. 95-822

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

RICHARD W. COSSEY, *Petitioner*
v.
STATE OF LOUISIANA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

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QUESTION PRESENTED

When a state, in a civil administrative proceeding, suspends a driver's license as a civil sanction for driving while intoxicated (DWI), and the State's highest court has held that the suspension serves not only remedial purposes but punitive purposes as well, does the suspension constitute "punishment" that renders unconstitutional, on double jeopardy grounds, a later criminal DWI prosecution based on the same conduct?

LIST OF PARTIES

The parties to the proceedings below are petitioner Richard W. Cossey and the respondent the State of Louisiana.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

RICHARD W. COSSEY, *Petitioner*
v.
STATE OF LOUISIANA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

The petition of Richard W. Cossey respectfully prays that a writ of certiorari issue to review the judgment of the Louisiana Supreme Court rendered September 22, 1995 denying petitioner's application for a writ of review in the above-entitled proceeding.

OPINIONS BELOW

The decisions of the trial court, the court of appeal, and the Louisiana Supreme Court are unreported, but are reproduced in the appendix hereto, pp. A-1 through A-6, *infra*.[1]

JURISDICTION

Petitioner has been charged by bill of information with driving while intoxicated. On February 22, 1995, petitioner's motion to quash the charge on the ground of double jeopardy was denied by the trial court. On May 4, 1995 the Louisiana Third Circuit Court of Appeal denied petitioner's application for a writ of review, and on September 22, 1995 the Louisiana

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[1] The trial court did not render a written opinion. That portion of the transcript containing the court's ruling is included in the Appendix.

Supreme Court also denied petitioner's application for a writ of review. Petitioner did not apply for rehearing.

The Louisiana Supreme Court is the highest court of the State of Louisiana in which a decision could be had in this case. The judgment of the Louisiana Supreme Court refusing to review the trial court's denial of petitioner's plea of double jeopardy is a final decision within the meaning of 28 U.S.C. 1257. *Abney v. United States*, 431 U.S. 651 (1977). Accordingly, this court has jurisdiction to decide the merits of this application under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment - Double Jeopardy Clause

STATUTES INVOLVED

Louisiana Revised Statutes 14:98 [R.S. 14:98]

Louisiana Revised Statutes 32:661 [R.S. 32:661(A)(1)]

Louisiana Revised Statutes 32:667 [R.S. 32:667(A)]

Louisiana Revised Statutes 32:414.D [R.S. 32:414(D)(1)]

STATEMENT OF THE CASE

Louisiana R.S. 14:98 makes it a crime to operate a motor vehicle while intoxicated. Under Louisiana's implied consent law, any person suspected of driving while intoxicated (DWI) may be required to submit to a breathalyzer test. R.S. 32:661. If the test shows that the operator's blood alcohol concentration (BAC) is greater than .10% by weight, the State may suspend the operator's driver's license as a civil sanction for DWI. R.S. 32:667. In addition, the State may prosecute the offender for DWI in a separate criminal proceeding.[2]

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[2] Under R.S. 14:98, proof that the defendant had a blood alcohol concentration of .10% or more is conclusive proof that he is guilty of DWI. Thus not only the conduct sought to be punished but the evidence used to prove it is the same in both the civil license suspension proceeding and the criminal DWI

On February 22, 1994, petitioner was involved in an automobile accident. After a breathalyzer test showed that his BAC was greater than .10%, he was arrested and charged with DWI. This is petitioner's third DWI offense.

For a third offense, the suspension period under R.S. 32:667 is one year with no eligibility for a hardship license. Third offense DWI is a felony and carries a mandatory prison sentence of 1-5 years. R.S. 14:98. Additionally, upon conviction of third offense DWI, the defendant's driver's license is automatically suspended for two years. R.S. 32:414.D.

The State of Louisiana suspended petitioner's driver's license for one year pursuant to R.S. 32:667 after an administrative law judge in a civil administrative proceeding found that petitioner's BAC at the time of the accident exceeded the legal limit. Thereafter, the State also instituted this criminal prosecution for DWI under R.S. 14:98.

Petitioner moved to quash the criminal charge contending that the suspension of his driver's license for one year under R.S. 32:667 constituted punishment for the DWI, and that this criminal prosecution is an attempt to punish him a second time for the same offense in violation of the double jeopardy clause of the Fifth Amendment of the Constitution.

The trial court denied petitioner's motion, citing as authority the Louisiana Supreme Court's decision in *Butler v. Department of Public Safety and Corrections*, 609 So.2d 790 (La. 1992). See Appendix, p. A-4). In *Butler* the court had held that, although the suspension of a driver's license under R.S. 32:667 is punitive, its primary purpose is remedial; therefore, it does not constitute punishment for double jeopardy purposes and does not bar a later criminal prosecution for DWI.

After denial of his motion, petitioner applied to the Louisiana Third Circuit Court of Appeal for a writ of review, but his application was denied without reasons. (See Appendix p. A-5). Petitioner then applied to the Louisiana Supreme Court for a writ of review, but again his application was denied without reasons.. (See Appendix p. A-6).

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prosecution.

REASONS FOR GRANTING THE WRIT

I. The decision below rejecting petitioner's double jeopardy plea is in direct conflict with decisions of this and other courts which have held that a sanction for illegal conduct that is not solely remedial, but also serves either retributive or deterrent purposes, constitutes punishment for double jeopardy purposes.

The double jeopardy clause protects against both multiple prosecutions and multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 440 (1989). While in some instances multiple punishments are allowed, they are barred if imposed in separate proceedings. *Missouri v. Hunter*, 459 U.S. 359 (1983).

The administrative proceeding resulting in the suspension of petitioner's driver's license and the criminal prosecution brought against him are, without doubt, separate proceedings. One is civil; the other is criminal. They were initiated pursuant to different statutes at different times in different tribunals employing different procedural rules. Accordingly, in ruling on this application, this Court may limit its inquiry to a single question--whether the administrative suspension of petitioner's driver's license constitutes punishment as that term has been defined by this Court in *Halper*.

In *Halper* this Court held that whether a sanction for illegal conduct constitutes punishment is not determined by whether by it is labeled "civil" or "criminal" but by its purpose. "A sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes is punishment" for double jeopardy purposes. 490 U.S. at 448. Thus, a civil sanction designed to deter or punish illegal conduct will support a double jeopardy plea in a separate criminal prosecution for the same offense, even if the sanction also has a remedial purpose. *Austin v. United States*, 509 U.S. ___, 113 S.Ct. 1801 (1993); *Dept. of Revenue of Montana v. Kurth Ranch, Inc.*, 521 U.S. ___, 144 S.Ct. 1937 (1994); *U.S. v. $405,089.23 U.S. Currency*, 33 F.3d 1210, 1219 (9th Cir. 1994); *U.S. v. Hudson*, 14 F.3d 536 (10th Cir. 1994).

Before *Austin* and *Kurth Ranch* were decided, local and state courts had held uniformly that suspension of a driver's license for DWI under a state's implied consent law did not bar a separate criminal prosecution for the same DWI offense. The rationale underlying most of those decisions was that a driver's license suspension for DWI is solely a remedial measure--it

removes drunk drivers from the highways--and therefore suspension is not punishment for double jeopardy purposes. But after *Austin* and *Kurth Ranch* were decided, courts began to recognize, as the Louisiana Supreme Court had in *Butler v. Dept. of Public Safety and Corrections, supra,* that the suspension of a driver's license for DWI serves both remedial and punitive goals.

The state courts now are clearly divided on the question whether an administrative license suspension is punishment. In Ohio for instance, a state appellate court, applying *Halper* and its progeny, found that the administrative suspension of the defendant's driver's license under Ohio's implied consent law was punishment because the suspension was clearly a penalty designed to deter drunk driving. *State of Ohio v. Gustafson*, 1995 WL 387619 (Ohio App. 7 Dist., 6/27/95).[3] Numerous other courts in other states have used the same rationale and have dismissed criminal prosecutions on double jeopardy grounds. But many courts, including the Louisiana courts in this case, have held otherwise.[4]

The only federal decision addressing the issue held that a one-year suspension "can only be deemed deterrent or punitive in nature" and thus triggers double jeopardy protection. *United States v. Johnson*, no. 95-76-M (E.D. Va. 9/1/95). In reaching that conclusion, the court said,"

> The suspension of an individual's installation driving privileges for one year does nothing to protect military installations, or society in general, from danger. It is common knowledge that blood alcohol content diminishes within a matter of hours, not months. Accordingly, the danger posed by any intoxicated individual, and

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[3] See Appendix p. A-9. *Gustafson* is now pending in the Supreme Court of Ohio.

[4] Included in the Appendix at page A-29 is a list of all cases known to peitioner decided after *Kurth Ranch* in which the courts have addressed the issue of whether the administrative suspension of a driver's license for DWI bars a subsequent criminal prosecution for the same DWI offense. All the cases applying the double jeopardy clause, except *State v. Gustafson,* are unreported, but written opinions issued in each those cases reflect that the courts based their decisions on *Halper*, *Austin*, and *Kurth Ranch* and used the same analysis as the court in *Gustafson.*

> the necessity for remedial action, extends only for a period of hours. That is not to say that the same individual again could not impose [sic] a danger to the public by becoming intoxicated, and driving. Indeed it is apparent that Army Regulation 190-5 was drafted in part to deter such a subsequent action. For this reason, Army Regulation 190-5 constitutes punishment within the meaning of the Double Jeopardy Clause. Being designed, at least in part, to deter, the suspension constitutes punishment and precludes subsequent criminal prosecution.

(See Appendix, p. A-25).

This Court already has recognized that one purpose of administrative license suspensions is to deter drunk driving and that the loss of a driver's license for even one day could have serious punitive effects. *Mackey v. Montryn*, 443 U.S. 1, 18, 30 (1979). Thus the courts that have held that driver's license suspensions are solely remedial ignore reality to reach that conclusion.

The decision in this case that the suspension of petitioner's driver's license for one year is not punishment is clearly wrong and conflicts with the principle enunciated in *Halper, Austin,* and *Kurth Ranch* that a civil sanction, if it is designed even in part to punish illegal conduct, constitutes punishment which bars a separate criminal prosecution for the same conduct. It also is at odds with the many cases in other states decided since *Austin* and *Kurth Ranch* which have expressly held that the administrative suspension of a driver's license for DWI bars a subsequent criminal prosecution for the same DWI offense.

II. A decision by this Court is vital to the administration of the criminal justice system. Each year, more than one million drivers are charged with DWI. *E.g., Statistical Abstract of the United States* (112th. ed.)(Table No. 302, Persons Arrested, by Charge, Sex, and Age: 1990); Bureau of Justice Statistics, Press Release, *Prior Records Common Among Drunk Drivers* (Sept. 30, 1992)(reporting 1.7 million DWI arrests in 1989). The question presented here thus can arise in hundreds of thousands of cases each year.

The uncertainty accompanying the present state of nonuniformity threatens law enforcement officials' efforts to deal with a widespread, serious social problem. They do not know whether they must choose between quick, administrative license suspension and a more serious criminal prosecution of DWI arrestees. Uniform guidance is needed to

enable states and their law enforcement officials to design constitutionally valid civil and criminal procedures to deal with DWI charges.

CONCLUSION

The suspension of petitioner's driver's license for one year under R.S. 32:667 is intended to punish him for driving while intoxicated and to deter him from doing it again. The fact that it might also have a remedial purpose cannot remove it from this Court's definition of punishment established in *Halper*, *Austin*, and *Kurth Ranch*. The conflict between the decision in this case and the decisions of this Court as to what constitutes punishment for double jeopardy purposes is readily apparent and can only be resolved by this Court.

Moreover, the effect of a decision by this Court will not be limited to this case. Double jeopardy pleas are now being asserted in countless DWI cases throughout the country. As the list of cases contained in the Appendix shows, the courts are divided on whether a driver's license suspension triggers double jeopardy protections. The courts need instruction from this Court as to whether the double jeopardy clause applies to ensure uniform nationwide application of the clause to the more than one million possible DWI prosecutions that arise each year.

Respectfully submitted,

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November __, 1995

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No. ____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

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STATE OF LOUISIANA, *Respondent*

APPENDIX TO
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EXCERPTS FROM TRANSCRIPT OF HEARING ON PETITIONER'S MOTION TO QUASH ON GROUNDS OF DOUBLE JEOPARDY

IN THE FOURTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF CALCASIEU
STATE OF LOUISIANA

STATE OF LOUISIANA :

VERSUS : NO. 15133-94

RICHARD W. COSSEY :

* * * * * * * * * * * * * * * * *

MR. McCORQUODALE:

> . . . We're just going to call into the record, *State of Louisiana v. Richard Cossey*, docket no. 15133-94. Your honor Mr. Badon has filed a motion for double jeopardy claiming that the--well, I'll let him explain it. . . .

MR. BADON:

> We're claiming that the suspension of the driver's license is--is punishment and it achieves double jeopardy. The State relies, I know, on State versus Butler, but Butler was based on a--an interpretation of Halper, U.S. versus Halper only. It was decided before U.S. versus Austin and Montana versus Kurth--Kurth Ranch, which came down in 1993 and 1994. Not only does it rely only on Halper and was before the other two U.S. Supreme Court cases, but misinterprets Halper. If you read Butler, and Butler is not totally against us, it says--it agrees that a suspension is punitive, but they say that it's not double jeopardy because it's also--also . . .

THE COURT:

> Remedial.

MR. BADON:

. . . remedial. What happens in the cases Austin and Kurth Ranch is they say that if--if it's--it must be solely remedial. Okay. If it's not solely remedial, if it's partly remedial, and Butler agrees that it's partly punishment and partly remedial, then jeopardy attaches. In this case, taking a driver's license away, it may be-- have a high-minded remedial purpose and to keep--keep people that drink of the road, but it--it also punishes somebody. It takes away a property right, and Butler recognized that. So, if you look at Butler in light of Austin, and you've got to read it in light of Austin and Kurth Ranch, then you'll--you'll see that it's not solely remedial as required. It's partly punishment, and that's always been the law in the United States, that one is not placed twice in jeopardy. He can't be punished twice. That being - being the case, you should--you should quash it, and I'll answer any questions, that the Court may have.

THE COURT:

Let me see what Mr. McCorquodale has.

Mr. McCORQUODALE:

Well, Your Honor, I just think it's inappropriate to compare the asset forfeiture cases which come down to quasi-criminal proceedings with a purely criminal proceeding. It's like comparing apples to oranges. You have an on point State Supreme Court decision. If the State Supreme Court made an error, someone needs to appeal that to them and let them see it, but so far, the law in Louisiana is that it's not an issue of double jeopardy, and I would suggest to the Court, furthermore, that if you go into the details and look into the basis for the administrative suspension, which is either going to be the refusal to take the test or the failure to take the test, that it difference than the actual criminal conduct which is driving while impaired. Now, to me, that's the distinction. I don't know if that's what the law is going to show, but that's the distinction, and until the Supreme Court rules otherwise, that's the law that we're stuck with.

MR. BADON:

I think a--Rob, will you stipulate that his license was suspended for . . .

MR. McCORQUODALE:

I'm sure--if he says it was suspended, Your Honor, I'm sure that it was.

THE COURT:

Well, we'll take that for granted then. It ought to be on record for whatever Mr. Badon is going to do. I--Mr. Badon, I'll tell you, I looked at this with Mr. Schrumpf yesterday, and I asked him if there were any--any U.S. Supreme Court cases dealing with driver's license revocation. I tend--I tend to agree with Mr McCorquodale that when this finally gets to our Louisiana Supreme Court, which it's going to, according to Mr. Schrumpf, it's up on two difference circuits now . . .

MR. McCORQUODALE:

That's correct.

THE COURT:

. . . and we're going to get an answer, but--but until--I concluded yesterday, and I still see it the same today that-- that as a trial judge where there's a specific Louisiana Supreme Court holding on something--and I see the argument you're making about the--about the Austin case and the other . . .

MR. BADON:

Kurth Ranch,Your Honor.

THE COURT:

yeah. But the cases--the U.S. Supreme court cases that came after the Louisiana Butler case are not driver's license cases, and I recognize your argument about the--about punitive and about how

what they say in Butler that it's got to be--that it was part punitive and now these later U.S. Supreme Court cases saying it's got to go solely remedial, but I'm going to--I'm not--I don't see it as my function in a situation like this to--to decide something contrary to a specific Louisiana Supreme Court holding that I think is still applicable at this moment unless I saw a U.S. Supreme court case involving a driver's license situation, because I've got to believe that when this all shakes out, a some distinction is going to be made between regulation of the privilege of driving and what you do to regulate it versus the forefeiture of property in the an asset forfeiture type situation. You know, I just . . .

MR. BADON:

Your Honor, my argument is all there. It's--it's clear in Bulter that they say that the driver's license is a property right, and its is both remedial and punitive. I--I think that it fits like a glove in the Austin and Montana versus Kurth Ranch. I respect the Court, sir, that those rulings . . .

THE COURT:

Yeah, maybe I'm being too conservative about that, but I'm --that--with the Supreme court case and being as recent as it is and being as specific as it is, I'm going to let them shake it out, so I will--I'll deny the motion to quash.

DECISION OF LOUISIANA COURT OF APPEAL

STATE OF LOUISIANA

Versus

RICHARD W. COSSEY

In Re: RICHARD W. COSSEY Defendant-Applicant

Applying for certiorari, or writ of review from:

Lower Court	14th
Lower Court Name	Calcasieu
Lower Court Number	15133-94
Lower Court Judge	GODWIN, FRED

Attorney for Plaintiff-Respondent
Bryant, Robert Richard, Jr. Esq.

Attorney for Defendant-Applicant
Badon, Kenneth E., Esq.

Attorney for Defendant-Applicant
Garber, Michael R., Esq.

May 4, 1995
Lake Charles, LA

WRIT DENIED: There is no error in the trial court's ruling.

s/JTK	*s/JCP*	*s/MGS*
J.T.K.	J.C.P.	M.G.S.

DECISION OF LOUISIANA SUPREME COURT

STATE OF LOUISIANA

VS. NO. 95-KK-1344

RICHARD W. COSSEY

IN RE: Cossey, Richard W.; - Defendant(s); Applying for Supevisory and/or Remedial Writs; Parish of Calcasieu 14th Judicial District Court, Div. "D" Number 15133-94; to the Court of Appeal, Third Circuit, Number KW95-0515

September 22, 1995

Denied.

HTL
WFM
JLD
JCW
CDK
JPV

JOHNSON, J. not on panel.

Supreme Court of Louisiana
September, 22, 1995

s/*Frans J. Labranche, Jr.*
Clerk of Court
For the Court

LOUISIANA STATUTORY LAW

R.S. 14:98

A. The crime of operating a vehicle while intoxicated is the operating of any motor vehicle, aircraft, watercraft, or other means of conveyance when:

(1) The operator is under the influence of alcoholic beverages, or

(2) The operator's blood alcohol concentration is 0.10 percent or more by weight, or is 0.04 percent or more by weight if the operator is under the age of eighteen years, based on grams of alcohol per one hundred cubic centimeters of blood; . . .

* * * * *

D. On a third conviction, regardless of whether the offense before or after an earlier conviction, the offender shall be imprisoned with or without hard labor for not less than one year nor more than five years and may be fined not more than two thousand dollars. At least six months of the sentence of imprisonment shall be without benefit of probation, parole, or suspension of sentence. . . .

R.S. 32:661(A)(1)

Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent, subject to the provisions of R.S. 32:662, to a chemical test or tests of his blood, breath, urine, or other bodily substance for the purpose of determining the alcoholic content of his blood and the presence of any abused or illegal controlled dangerous substance as set forth in R.S. 40:964 in his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle while believed to be under the influence of alcoholic beverages or any abused or illegal controlled dangerous substance as set forth in R.S. 40:964.

R.S. 32:667(A)

When a law enforcement officer places a person under arrest for a violation of R.S. 14:98 or a violation of a parish or municipal ordinance that prohibits operating a vehicle while intoxicated and the person either

refuses to submit to an approved chemical test for intoxication, or submits to such test and such test results show a blood alcohol level of 0.10 percent or above by weight of alcohol in the blood or, if the person is under the age of eighteen years, a blood alcohol level of 0.04 percent or above by weight of alcohol in the blood, the following procedures shall apply:

> (1) If the person submitted to the test and the test results show a blood alcohol level of 0.10 percent or above by weight of alcohol in the blood, his driving privileges shall be suspended for ninety days from the date of suspension on first offense violation, without eligibility for a hardship license for the first thirty days, and for three hundred sixty-five days from the date of suspension, without eligibility for a hardship license, on second and subsequent violations occurring within five years of the first offense. If the person was under the age of eighteen years on the date of the test and the test results show a blood alcohol level of 0.04 percent or above by weight of alcohol in the blood, his driving privileges shall be suspended for one hundred eighty days from the date of suspension on a first violation, and for three hundred sixty-five days from the date of suspension, without eligibility for a hardship license, on second and subsequent violations occurring within five years of the first offense.

R.S. 32:414(D)(1)

The department shall suspend the license of any person for a period of twenty-four months upon receiving satisfactory evidence of conviction, plea of guilty, or plea of nolo contendere, and sentence thereon, or of the forfeiture of bail of any such person as determined by any court of jurisdiction as set forth in the Section, with regard to a third or subsequent offense for operating a motor vehicle while under the influence of beverages of alcoholic content, of narcotic drugs, or of central nervous system stimulants. Third or subsequent offenses for purposes of this Subsection does not refer to the criminal charge but rather to the number of offenses resulting in conviction, guilty pleas, nolo contendere pleas, or bond forfeitures within five years from date of first offense to the date of third offense.

STATE of Ohio, Plaintiff-Appellant,

v.

Robert GUSTAFSON, Jr., Defendant-Appellee.

No. 94 C.A. 232.
Court of Appeals of Ohio, Seventh District, Mahoning County.
June 27, 1995

Criminal Appeal from Mahoning County Court No. 2
No. 93 TR 5344AB

James A. Philomena, Pros. Atty., Michele G. Cerni, Asst. Pros. Atty., Youngstown, for plaintiff-appellant.
Martin Delahunty, III, Youngstown, for defendant-appellee.

OPINION

COX, Judge.

*1 This matter presents a timely appeal from a decision of the Mahoning County Court No. 2, Boardman, Ohio, granting defendant-appellee, Robert Gustafson, Jr.'s motion to dismiss.

On November 27, 1993, appellee was stopped for speeding by an Ohio State Highway Patrol officer. During that stop, appellee was arrested for driving under the influence, in violation of R.C. 4511.19(A)(1) and R.C. 4511.19 (A)(3). Appellee submitted to a chemical test, with results indicating a blood alcohol content of .115. Pursuant to R.C. 4511.191, the arresting officer immediately issued appellee an administrative license suspension for a ninety day period.

On November 30, 1993, appellee entered a plea of not guilty and waived the statutory time for a hearing in this matter. After discovery, appellee filed a motion to suppress and later, a motion to dismiss on double jeopardy grounds. On November 6, 1994, the trial court granted appellee's motion to dismiss and rendered his motion to suppress moot. Appellant filed this appeal on November 21, 1994, pursuant to R.C. 2945.67.

Appellant, State of Ohio, sets forth a sole assignment of error which alleges: "As imposition of an administrative license suspension pursuant to R.C. 4511.191 is a civil sanction rationally related to legitimate

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governmental purposes and, thus, does not constitute punishment for the purpose of double jeopardy, the trial court erred sustaining defendant-appellee's motion to dismiss the DUI charges pending against him."

Since September 1993, the "implied consent" provisions of R.C. 4511.191 have mandated that an arresting officer, on behalf of the Ohio Bureau of Motor Vehicles, immediately suspend an offender's license who either refuses to be tested for alcohol content or who tests above the prohibitive level. An administrative license suspension (ALS) continues in effect unless the offender appeals on or before the intial court appearance, which must be within five days of arrest. An ALS for refusal to test is one year and for test results indicating a blood alcohol content of .10 or higher, ninety days for the first offense. R.C. 4511.19(A)(1) and (3) state, in relevant part:

> "(A) No person shall operate any vehicle, * * * within this state, if any of the following apply: (1) The person is under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse; * * * (3) The person has a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath * * *."

Appellant contends that the crux of this appeal is whether or not an ALS constitutes punishment for purposes of double jeopardy. The Fifth Amendment to the United States Constitution provides, in pertinent part: " * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb: * * *." According to United States v. Halper (1989), 490 U.S. 435, 440, the double jeopardy clause encompasses multiple punishments for the same offense.

*2 The United States Supreme Court has declared that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; * * *." United States v. One Assortment of 89 Firearms (1984), 465 U.S. 354. Appellant maintains that when civil and criminal sanctions are imposed in one proceeding, there is no double jeopardy violation. Double jeopardy's multiple punishment component usually arises when one receives punishment in two proceedings for the same offense and/or where one offense is punishable under two or more statutory provisions.

The case at bar focuses the double jeopardy question on a situation where there is criminal prosecution and a prior or subsequent civil action, both

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resulting in sanctions. In Helvering v. Mitchell (1939), 303 U.S. 391, the Supreme Court stated: "The question for decision is * * * whether [the statute in question] imposes a criminal sanction. That question is one of statutory construction."

Appellant argues that the facts in the case upon which appellee relies most heavily, Halper, supra, are distinguishable and the analysis, when applied to the case at bar, produces the opposite result. Halper, supra involved two separate proceedings--the first, a criminal action, resulted in a prison term and a fine; the second, a civil action, resulted in an additional monetary penalty of over $130,000.00. The court held that the civil penalty bore no rational relation to the government's loss and therefore imposition of the full statutory amount violated the double jeopardy clause.

Appellant claims that just because a civil sanction has a punitive effect does not mean that it is punishment sufficient for double jeopardy to attach but rather, the court should look to whether a legitimate government interest is furthered by imposition of the civil sanction. In support, appellant cites the holding in Halper, supra:

> " * * * under the double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."

Appellant urges that appellee's reliance on forfeiture cases, such as Austin v. United States (199), 509 U.S. ----, 125 L.Ed.2d 488, to support his argument is misplaced and non-applicable here.

In examining whether an ALS constitutes a proceeding and punishment that is not remedial in nature but rather, only a deterrent or retribution, appellant contends that the court in State v. Nichols (1991), 819 P.2d 995 declared "* * * administrative proceedings generally are not prosecutions, notwithstanding the fact that the administrative proceeding may even result in a loss of liberty." The Nichols, supra court explained that nothing about an automatic administrative revocation parallels the procedure in a criminal prosecution since it does not require an accused to post bond nor can he be fined or imprisoned for refusal to take a blood test. The Nichols, supra court concluded:

*3 " * * * the fact that a statute designed primarily to serve remedial purposes incidentally serves the purposes of punishment as well does not mean that the statute results in punishment for double jeopardy purposes."

Appellant submits that the court in Mackey v. Montrym (1979), 443 U.S. 1, acknowledged that an ALS serves several legitimate governmental purposes other than punishment, such as preserving the safety of its public highways, and therefore, an ALS in Ohio does not rise to the level of a criminal proceeding for double jeopardy purposes.

Appellant alleges that an ALS is temporary and restricted privileges are possible. Appellee did not come before the trial court to appeal the ALS as he waived his right to do so. The trial court recognized an ALS appeal to be a civil action independent of the criminal action. Nonetheless, appellant argues that the ALS and the criminal charges encompass one integral proceeding as there is only one case number and one docket for both, the ALS and any appeal thereof is heard by the same trial court judge who hears the criminal charges and the ALS herein could not have occurred in any context other than in conjunction with the DUI charges filed against appellee.

Appellant further contends that whatever embarrassment or hardship appellee suffered was counterbalanced and outweighed by the public's protection from this potentially reckless or hazardous driver. Therefore, appellant submits that the ALS's remedial effect does not violate the double jeopardy clause and the trial court misunderstood the reach of Halper, supra and its progeny, erring in dismissing the DUI charges pending against appellee.

Appellee responds it is established law that the double jeopardy clause is not limited to "life or limb" sanctions, as it has been held to apply to imprisonment and monetary penalties. Appellee's driver's license suspension pursuant to R.C. 4511.191 was a punishment that barred his prosecution for the same conduct under R.C. 4511.19.

This Court need only analyze the same two issues examined by the trial court:

1. Do the suspension provisions of R.C. 4511.191 take place in a separate proceeding from the prosecution maintained for violations of R.C. 4511.19; and

2. Do the sanctions imposed pursuant to R.C. 4511.191 constitute punishment.

Contrary to appellant's position, the double jeopardy clause does apply where the state imposes civil penalties by means of an administrative action. (See Montana Department of Revenue v. Kurth Ranch (1994), 511 U.S. ----, 128 L.Ed.2d 767). The sanctions imposed pursuant to R.C. 4511.19 take place separately and wholly independent from R.C. 4511.191. The monetary penalty (license reinstatement fee of $250.00) imposed at the end of the suspension period pursuant to the sanctions of R.C. 4511.191 is also independent of the fine structures set forth under R.C. 4511.19 and is paid to the Ohio Bureau of Motor Vehicles, not to the court.

*4 R.C. 411.191(D)(1)(a) states that the license suspension is independent of any penalties or sanctions imposed pursuant to any other section of the Revised Code. While the individual charged with an alleged violation of R.C. 4511.19 is entitled to a jury trial and appointment of counsel if he cannot afford one, the individual who enters the judicial system for purposes of appealing the sanctions of R.C. 4511.191 is not entitled to these rights and further ,he, rather than the state, bears the burden of proof in this action. R.C. 4511.191(H)(2).

In Peebles v. Clement (1980), 63 Ohio St.2d 314, the court held the United States Supreme Court decisions may be utilized to interpret Ohio guarantees that are substantially equivalent to the guarantees contained in the United States Constitution.

Just because sanctions imposed pursuant to R.C. 4511.191 are classified as civil does not act to bar an examination concerning whether such sanction constitute a punishment for purposes of double jeopardy. Further, pursuant to Halper, supra, the label placed on a sanction shall not control examination of whether such sanctions constitutes punishment.

Appellant fails to bring to this Court's attention the requirement that in order for a civil sanction to escape a determination as punishment, it must be solely remedial. Appellant's position that as long as the sanction serves some remedial goals it does not constitute punishment, is an intentional misrepresentation of the holding in Halper, supra.

The court in Austin, supra, stated:

> "[A] civil sanction that cannot be fairly said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment as we have come to understand the term."

The metamorphoses of law that is required to take place in the advent of Kurth Ranch, supra and its progeny cannot be found by looking to old case law. An Arizona municipal court in State v. Austin (Dec. 20, 1994), Coconino Case Nos. 257256/57/58, unreported, reviewed Nichols, supra in light of United States v. $405,089.23 U.S. Currency (Sept. 6, 1994), 9th Cir. App. No. 93-55947, unreported, and concluded that double jeopardy exists when the state administratively suspends an individual's driver's license for DUI and then seeks to prosecute that individual for the same conduct.

An obvious deterrent purpose exists in R.C. 4511.191 and Ohio has engaged in an extensive public relations campaign to warn motorists of what punishment they will incur if they operate a motor vehicle while under the influence of alcohol. The deterrent intent in R.C. 4511.191 becomes clearer upon review of the harsher sanctions that are imposed pursuant to this statute for each successive violation.

It is readily evident that the entire class of individuals subject to the sanctions of R.C. 4511.191 are also the class of individuals subject to the sanctions of R.C. 4511.19. In fact, R.C. 4511.191 contemplates that any individual being subjected to its sanctions has already been arrested for allegedly violating R.C. 4511.19.

*5 Speaking to the issue of summary suspensions, the United States Supreme court stated: "[f]irst, the very existence of the summary sanction of the statute serves as a deterrent to drunken driving." Mackey v. Montrym, supra, at 18.

In this society where public transportation is either non-existent or is, at best, inadequate and entire commercial shopping areas are located in suburbs surrounding our cities, we can no longer view a driver's license as merely a privilege which is given by the State and which is subject to revocation at any time. Having a driver's license has not taken on greater meaning. Pursuant to the court in Ohio Bureau of Motor Vehicles v. Williams (1994), 97 Ohio App.3d 779, a driver's license is a substantial right which may not be deprived without due process.

In enacting R.C. 4511.191, the legislature clearly intended to institute a penalty designed to deter drunk driving in contemplation of swift punishment. R.C. 4511.191 is, a the very least, partly punitive as it acts to punish individual conduct, focusing on the culpability of a specific driver, rather than serving general remedial purposes.

The license suspension proceeding under R.C. 4511.191 and the criminal trial for a violation of R.C. 4511.19 are separate proceedings arising out of the same conduct. A suspension is imposed regardless of the trial's outcome. Further, R.C. 4511.191(K) states:

> "The registrar shall credit against any judicial suspension of a person' driver's or commercial driver's license or permit or nonresident operating privilege imposed pursuant to division (B) or (E) of section 4507.16 of the Revised Code any time during which the person serves a related suspension imposed pursuant to division (E) or (F) of this section."

The intent to punish under R.C. 4511.191 is clear by virtue of the fact that credit is given for the license suspension as aforementioned.

Additionally, the reinstatement fees set forth in R.C. 4511.191 are nothing more than hidden taxes incorporated by the legislature without the vote of the people. Given the economic conditions as they exist in this State, especially that within the district where this court resides, the cost factors on just the administrative level are astronomical. Such costs could legitimately consume more than two weeks salary or wages for someone working on a minimum wage schedule and may, in themselves, constitute cruel and unusual punishment for what should be considered a traffic offense.

Calling a ninety day suspension, a $250.00 reinstatement fee and a prohibition against work privileges for fifteen days remedial does not change it from the punishment it was intended to be.

The existence of a deterrent purpose is R.C. 4511.191 alone or in conjunction with the finding of a retributive intent associated with the sanctions contained therein, mandates finding that the sanction imposed on appellee was a punishment for purposes of double jeopardy. The trial court below properly determined that the institution of the sanctions in R.C. 4511.191 upon appellee barred the prosecution of those charges arising

under R.C. 4511.19, since they resulted from the same conduct for which appellee had already been punished.

*6 Appellant's sole assignment of error is without merit. The judgment of the trial court is affirmed.

O'Neill, P.J., and Donofrio, J., concur.
Ohio App. 7 Dist., 1995

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	CRIMINAL
NO. 95-76-M		
	)	
KENNETH JOHNSON,	)	
	)	
Defendant,	)	

MEMORANDUM OPINION

Defendant Kenneth Johnson is charged in a three count Superseding Criminal Information as follows: (I) Driving While Under the Influence of Alcohol with a prior conviction of Driving While Intoxicated in violation of 18 U.S.C. § 13, assimilating Va. Code Ann. § 18.2-266(ii); (II) Reckless Driving in violation of 18 U.S.C. § 13, assimilating Va. Code Ann. § 46.2-862(i); and (III) Operating after Suspension with a prior conviction in violation of 18 U.S.C. §, assimilating Va. Code Ann. § 46.2-301. Each charge is a class 1 misdemeanor, the assimilated maximum punishment for which is one year in jail and a fine of $2,500. In addition, conviction on counts I and III may result in suspension of Johnson's driving privileges in the special maritime and territorial jurisdiction of the United States. As a condition of probation, Defendant's driving privileges may be revoked or restricted for locations other than in the special maritime and territorial jurisdiction of the United States.

Johnson moves to dismiss all charges on grounds of double jeopardy.

I.

The criminal charges arise from an incident on January 10, 1995, when Johnson, a civilian, was driving on Route 1 in Fairfax County, Virginia, at a location within the boundaries of Fort Belvoir and within the special maritime and territorial jurisdiction of the United States. Johnson

initially was stopped for driving 63 miles per hour in a posted 35 mile per hour zone. Based on information obtained at the scene and tests administered to Johnson, officers of the Fort Belvoir military police determined probable cause and arrested Johnson for driving under the influence of alcohol. After being arrested, Johnson was given a breath test under the federal implied consent law.[1] Johnson's breath test revealed a breath alcohol content (BAC) of 0.07 percent by volume.

Separate and apart from the criminal charges pending in this Court, the Fort Belvoir Garrison Commander suspended Johnson's privilege to operate a motor vehicle on all military installations for one year pursuant to Army Regulation 190-5, Motor Vehicle Traffic Supervision, ¶ 2-5.[2]

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[1] The federal implied consent law, 18 U.S.C. § 3117(a), provides that a driver on federal land arrested for drunken driving impliedly consents to a breath, blood, or urine test.

[2] Army Regulation 190-5 which empowers an installation commander to "[r]emov[e] intoxicated drivers from installation roadways followed by the expeditious application of appropriate sanctions" provides in pertinent part:

> [I]nstallation driving privileges will be immediately suspended pending resolution of the intoxicated driving incident in the following circumstances:
>
> (a) Refusal to take or complete a lawfully requested chemical test to determine contents of blood for alcohol or other drugs.
>
> (b) Operating a motor vehicle with a blood alcohol content (BAC) of 0.10 percent by volume or higher or in violation of the law of the jurisdiction that is being assimilated on the military installation.
>
> (c) Operating a motor vehicle with a BAC of at least 0.05 percent by volume but less that 0.10 percent blood alcohol by volume in violation of the law of the jurisdiction in which the vehicle is being operated if the jurisdiction imposes a suspension solely on the basis of BAC level.

Army Regulation 190-5, Section 2-5(3)(a)-(e).

Jonson was notified of this suspension by letter dated January 15, 1995. The notice states that Johnson's installation driving privileges were "immediately" suspended for one year because of the driving under the influence charge, and that the suspension was "administrative" in nature. The military suspension of Johnson's driving privileges preceded by 22 days the filing of the criminal information herein.

The notice from the Garrison Commander informed Johnson that he could request a hearing before the Installation Driving Privileges Review Board ("IDPRB") to determine if his post driving privileges would be restored pending resolution of the criminal charge, by submitting a written request to the Provost Marshal Office within 10 days of receipt of the letter. The notice stated further that Johnson could present evidence and witnesses, and be represented by counsel at the IDPRB, but only at his own expense. Johnson did not request a hearing before the IDPRB within the permitted 10 day period.

The notice to Johnson further provided that Johnson's post driving privileges could be re-instated only upon request, regardless of the outcome of the pending criminal charges. In the event that Johnson is acquitted, his driving privileges will not automatically be restored. The last substantive sentence of the letter informed Johnson that "[r]gardless of the outcome of your criminal case, the IDPRB has the authority to suspend your installation driving privileges."

Pursuant to Army Regulation 190-5 ¶ 2-10, because "[t]he preliminary suspension resulted from a BAC test,"[3] the suspension of

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[3] Army Regulation 190-5, ¶ 2-10 provides that driving privileges will not be restored upon acquittal in the following circumstances:

(a) The preliminary suspension was based on refusal to take a BAC test.

(b) The preliminary suspension resulted from a BAC test (unless disposition of the charges was based on invalidity of the BAC test). When a valid BAC test is involved, the suspension will continue pending completion of a hearing ....

(c) The person was driving or in physical control of a motor

Johnson's post driving privileges will remain in effect, even if he is acquitted of the pending criminal charge, until such time as the military completes a hearing, provided, of course, that Johnson timely requests such a hearing. Specifically, in the event that Johnson is acquitted, either found not guilty or the charge is dismissed or reduced to an offense not amounting to intoxicated driving, Johnson again will be notified by the military of the opportunity to request a hearing within 10 working days. The burden to request the hearing falls upon Johnson. Apparently, if Johnson does not request a hearing, his privilege to drive remains suspended for the one year period. If a hearing is requested and granted, the following evidence will be considered: (1) the arrest report; (2) the commander's report of official disposition: (3) information presented by Johnson; and (4) "such other information as the hearing officer may deem appropriate." Army Regulation 190-5, ¶ 2-10. If the hearing officer determines by a "preponderance of the evidence" that Johnson was engaged in intoxicated driving, Army Regulation 190-5, ¶ 2-10 mandates that Johnson's post driving privileges be revoked for one year from the date of the original preliminary suspension.

In the event that Johnson is convicted of the pending charge of driving under the influence, the suspension of his post driving privileges automatically will become a revocation for a mandatory period of not less than one year. See Army Regulation 190-5, ¶ 2-5(3).

II.

Johnson argues that the January 15, 1995 one year suspension of his driving privileges on all military installations constituted punishment, and that the prosecution of this case violates his Fifth Amendment rights under the United States Constitution not to be put twice in jeopardy for the

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vehicle while under a preliminary suspension or revocation.

(d) An administrative determination has been made by the State or host nation licensing authority to suspend or revoke driving privileges based on local law or pertinent regulations.

(e) The individual has failed to complete a formally directed substance abuse or driver's training program.

same offense.[4] The Double Jeopardy Clause of the United States Constitution guarantees three constitutional protections. As the Supreme Court has stated: "The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments fro the same offense." Untied States v. Halper, 490 U.S. 435, 440 (1989). While in some instances multiple punishments are permissible, they are barred if imposed in separate proceedings. Missouri v. Hunter, 459 U.S. 359 (1983).

It is the third double jeopardy protection which Johnson seeks in this case. Johnson argues that the suspension of his right to operate a motor vehicle on all military installations for the period of one year was a "punishment" prescribed by the Double Jeopardy Clause. Johnson submits that he cannot now be exposed to a second jeopardy in the present criminal proceedings based on the same conduct which caused him to be punished by the Fort Belvoir Garrison Commander.

The issue to be described by this Court is whether the military authorities can suspend Johnson's driving privileges for his alleged alcohol related driving behavior and subsequently prosecute him in federal court for the same behavior. In deciding this issue, the Court recognizes the authority of the Garrison Commander to restrict or revoke installation driving privileges. That authority is not at issue here, and is not addressed by this Court.

In order to determine whether the Government's prosecution of Johnson constitutes double jeopardy after the suspension of his installation driving privileges pursuant to Army Regulation 190-5, this Court must address two issues:

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[4] "The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution "provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life and limb'". This clause prohibits not only multiple trials fro the same offense but also "multiple punishments for the same offense." Brown v. Ohio. 432 U.S. 161, 164-165. (1977) (citations omitted).

(1) whether the administrative license suspension pursuant to Army Regulation 190-5 and Johnson's criminal prosecution constitute separate proceedings; and

(2) whether the one year administrative license suspension pursuant to Army Regulation 190-5 constitutes punishment.

If the answer to both questions is affirmative, then the Government's prosecution of Johnson in this Court constitutes a successive attempt to impose punishment in violation of the Double Jeopardy Clause.

A. The Administrative License Suspension Procedure Pursuant to Army Regulation 190-5 is a Separate Proceeding

The Government by its arguments and briefs appears to concede that the administrative sanction was a separate proceeding for the same offense under the requirements of United States v. Halper, 490 U.S. 435 (1989); Austin v. United States, 113 S. Ct. 1801 (1993); and Department of Revenue v. Kurth Ranch 114 S. Ct. 1937 (1994).

Also, this Court tends that the timing, nature and content of the administrative license suspension pursuant to Army Regulation 190-5 clearly mark it as a separate proceeding from criminal prosecution under 18 U.S.C. § 13, assimilating Va. Code Ann. § 18.2-266 (ii). The two proceedings are instituted at different times before different tribunals. While a hearing is available pursuant to Army Regulation 190-5, this hearing can only be classified as a civil action independent of any criminal action. The hearing is heard separately of any criminal charges. The individual whose license is suspended is not entitled to a jury trial and he is not afforded a right to counsel.

As the Ninth Circuit stated: "We fail to see how two separate actions, one civil and one criminal, instituted at different time, tried at different times before different factfinders, presided over by different district judges, and resolved by separate judgments, constitute the same 'proceeding.' In ordinary legal parlance, such actions are often characterized as 'parallel proceedings,' but not as the 'same proceeding.'" Johnson having established that the suspension of his driving privileges has taken place in a separate proceeding, the Court must determine whether or not the administrative suspension is punishment.

B. The One-Year Administrative Suspension of all Installation Driving Privileges Constitutes Punishment

The Supreme Court has made it clear that ostensibly civil sanctions may be construed as punishment for double jeopardy purposes. United States v. Halper, 490 U.S. 435 (1989). In Halper the Supreme Court determined that the labels of "criminal" or "civil" "are not of paramount importance" in determining whether a sanction constitutes punishment for double jeopardy purposes. The Court found that "[t]he motion of punishment, as we understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads." Id. at 447-48. Applying these principles, the Supreme Court fashioned the following test for determining whether a civil sanction constitutes punishment for double jeopardy purposes: "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." Id. at 448.

Since Halper, the Supreme Court has emphasized that a sanction designed even in part to deter or punish will constitute punishment. The recent Austin and Kurth Ranch decisions have made clear that the initial double jeopardy inquiry is whether the regulation is solely remedial and not retributive or punitive. "Fundamentally . . . '[a] civil sanction that cannot be fairly be said solely to serve a remedial purpose but rather can only be explained as also serving either retributive or deterrent purposes, is punishment as we have come to understand the term.'" Austin v. United States, 113 S. Ct. at 505 (quoting United States v. Halper, 490 U.S. 435, 448 (1989)). "A defendant convicted and punished for an offense may not have a non-remedial civil penalty sanction imposed upon him for the same offense in a separate proceeding." Department of Revenue v. Kurth Ranch, 114 S. Ct. at 1945 (citing United States v. Halper).

The Government argues that the suspension of driving privileges is an administrative or civil action which is remedial in nature and does not invoke double jeopardy. The Government cites an unpublished Eighth Circuit case, United States v. Bulloch, 1993 WL 177690 (8th Cir. 1993). In Bulloch a civilian employee at the Pine Bluff Arsenal was charged and convicted of driving under the influence. Prior to being convicted of DUI, Bulloch had his post driving privileges suspended for one year by the installation commander. The Court rejected Bulloch's double jeopardy

argument, stating simply "[a]pplication of the administrative sanction against Bulloch is not so divorced from any remedial goal that it 'constitutes punishment' for purposes of double jeopardy." Not only does Bulloch fail to provide any reasoned support for its conclusion, but it was decided before the Austin and Kurth Ranch cases. Because it was decided without the benefit of the Supreme Court's analysis in Austin and Kurth Ranch, the Bulloch case is not persuasive authority.

The Government has submitted several other state court decisions. See City v. Nutter, 546 N.E. 2d 1209 (Ohio Mun. 1995); Ohio v. Uncapher, 1995 WL 261584 (Ohio Mun. 1995); Johnson v. State, 622 A.2d 199, 204-205 (Md. Ct. App. 1993); Butler v. Department of Public Safety and Corrections, 609 So.2d 790, 795-961 (La. 1992); Kansas v. Maze, 825 P.2d 1169 (Kan. Ct. App. 1992); Ellis v. Pierce, 282 Cal. Rptr. 93 (Cal. Ct. App. 1991); Burrows v. Texas Dep't. 740 S.W. 2d 19 (Tex. Ct. App. 1987). Most of these decisions involve state license suspensions due to statutes concerning operation of a motor vehicle while intoxicated. In each instance the license suspensions were upheld as not constituting "punishment" for double jeopardy purposes. None of these state court opinions is binding precedent on this court. Moreover, all but one of three cases relied upon by the government were decided prior to the Austin and Kurth Range cases. In the wake of Austin and Kurth Ranch it is now well established that a civil sanction which is designed even in part to deter or punish constitutes punishment for double jeopardy purposes, regardless of whether it also has a remedial purpose.

In the present case, the suspension of driving privileges pursuant to Army Regulation 190-5 is not "remedial" as explained by Halper. The defendant in Halper had been convicted of Medicare fraud under the criminal false-claims act (19 U.S.C. § 287), sentenced to prison for two years and fined $5,000 and then subjected to an additional penalty of more than $130,000 under the civil false-claims act (31 U.S.C. §§ 3729-3731). The Court ruled that in order to uphold the civil sanction as remedial, the sanction had to bear a rational relation to the goal of compensating the government for its actual loss. Thus, the notion of a sanction being remedial in the sense of Halper connotes redress to an injured party. The regulation at issue achieves no compensation to any injured party for any tangible loss. The Government claims no loss. No one is alleged to have been injured by Johnson. In addition, suspension of Johnson's driving privileges pursuant to Army Regulation 190-5 was made absent a determination that Johnson had violated any law. For these reasons, the Fort Belvoir suspension cannot be characterized fairly as remedial within

the meaning of Halper, but it at best partly a deterrent, and at worst, it is solely punitive.[5]

Unlike the majority of license suspension schemes which have been upheld by other courts, the license suspension at issue is for one year, a period of such length that it can only be deemed deterrent or punitive in nature. A driver's license is a constitutionally protected interest. Bell v. Burson, 402 U.S. 535 (1971). The suspension of an individual's installation driving privileges for one year does nothing to protect military installations, or society in general, from danger. It is common knowledge that blood alcohol content diminishes within a matter of hours, not months. Accordingly, the danger posed by any intoxicated individual, and the resulting necessity for remedial action, extends only for a period of hours. That is not to say that the same individual against could not impose a danger to the public by becoming intoxicated, and driving. Indeed, it is apparent that Army Regulation 190-5 was drafted in part to deter such a subsequent action. For this reason, Army Regulation 190-5 constitutes punishment within the meaning of the Double Jeopardy Clause. Being designed, at least in part, to deter, the suspension constitutes punishment and precludes subsequent criminal prosecution.

Significantly, pursuant to Army Regulation 190-5, the suspension may continue regardless of the outcome of the individual's criminal case. In this case, even if acquitted of the underlying criminal charge, Johnson's driving suspension will continue unless he requests a hearing within 10 days of notice and the hearing officer subsequently fails to find by a preponderance of the evidence that he was driving under the influence of alcohol. Even the specific details of the hearing belie its punitive nature: the provision of a hearing only upon request; the limited ten day window within which a hearing must be requested; the decreased burden of proof on the government; and the decreased evidentiary standards. All of these

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[5] Notable, Army Regulation 190-5, ¶ 2-5(a)(1) provides that "[d]riving privileges are usually suspended when other measures have failed to improve a driver's performance. Measures should include counseling, remedial driving training, and rehabilitation programs.: Yet, in the present case, none of the suggested alternative remedial measures was attempted or even available to Johnson.

factors illustrate the punitive nature of Army Regulation 190-5.[6]

If is clear from a reading of Halper that this Court must look not only to the purpose of Army Regulation 190-5, but also to its history to determine whether it is designed to be remedial, or retributive and deterrent in purpose. See Halper, 490 U.S. at 448 ("[the] determination ... requires a particularized assessment of the penalty imposed and the purposes that the penalty may be fairly said to serve. Simply put, civil as well as criminal sanctions constitute punishment when the sanctions as applied in the individual case serve the goals of punishment").

The framework and intent of Army Regulation 190-5 clearly exemplify the government's attempt to deter individuals from operating motor vehicles under the influence of alcohol or drugs and to immediately punish those who do. Army Regulation 190-5 identifies the following "Program Objectives":

> (a) Safe and efficient movement of personnel and vehicles;
>
> (b) Reduction of traffic deaths, injuries, and property damage from traffic accidents ...;
>
> (c) Intergration of installation safety, engineering, legal, medical, and law enforcement resources into the installation traffic planning process; and

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[6] In a companion case, United States v. Imngern, 95-266-M, which also is decided this date. Defendant is charged with failure to take a breath test in addition to driving under the influence of alcohol. Defendant Imngern contends, without disagreement from the Government, that his installation driving privileges were suspended for one year because of the driving under the influence charge. Because Imngern allegedly failed to take a breath test, however, the suspension of his driving privileges upon acquittal in federal court will not be vacated by the Garrison Commander. Unlike Johnson, Imngern is not entitled to a hearing of any kind if he is acquitted in this Court. When applied to a defendant whose charge of driving under the influence of alcohol is coupled with a refusal to take a breath test, Army Regulation 190-5 is even more punitive. See Army Regulation 190-5, ¶ 2-10a.

(d) Removal of intoxicated drivers from installation roadways followed by the expeditious application of appropriate sanctions. (emphasis supplied)

Army Regulation 190-5, Section 1-5.

The Court finds that Army Regulation 190-5 does have the laudable intent of keeping federal enclaves safe. However, after complete analysis of the purpose of Army Regulation 190-5, the mechanics of the regulation, and its application, this Court concludes that a suspension pursuant to Army Regulation 190-5 is punishment for double jeopardy purposes because its actual effects are those of deterrents and punishment.[7]

III.

The authority of the military base commander to restrict or revoke driving privileges on military installations is clear. The military cannot, however, impose punitive civil sanctions and subsequently seek criminal prosecution for the same alleged conduct. When the Garrison Commander suspended Johnson's license for one year, he did not do so solely for remedial purposes. The suspension by military authorities for a one year period, therefore, is punishment invoking the protections of the Double Jeopardy Clause of the Constitution.

Accordingly, the instant prosecution on Count I charging Johnson with operating a motor vehicle under the influence of alcohol after having been convicted of driving while intoxicated within 5 years, 18 U.S.C. § 13, (assimilating VA Code 18.2-266(ii)) will be dismissed. Counts II and III of the superseding Criminal Information, which do not arise from the

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[7] For cases arising in the Norfolk Division of this District, and from the Marine corps Combat and Development Command, Quantico, Virginia, heard in this Division, base commanders routinely do not suspend driving privileges, or initiate other sanctions, until after disposition of criminal proceedings. The practice in the Norfolk Division and at Quantico, apparently followed without prejudice to the military installations, and presumable implemented with an appreciation of the double jeopardy questions, would eliminate double jeopardy issues in cases from Fort Belvoir.

conduct for which Johnson has been punished by the Garrison Commander, are not subject to claims of double jeopardy, and the Motion to Dismiss Counts II and III be denied.

s/*W.C. Sewell*
W. Curtis Sewell
U.S. Magistrate Judge

September 1, 1995
Alexandria, Virginia

CASES IN WHICH COURTS HELD SEPARATE CRIMINAL PROSECUTIONS BARRED BY DOUBLE JEOPARDY CLAUSE

ALASKA

Third Judicial District Court

State of Alaska v. Zerkel	No. 3AN-S94-08450 CR
State of Alaska v. Reierson	No. 3HO-94-448 CR
State of Alaska v. Zemanek	No. 3KN-94-294-CR
State of Alaska v. Alman	No. 3KN-94-650-CR
State of Alaska v. Anderson	No. 3KN-94-933-CR
State of Alaska v. Terrel	No. 3KN-94-997-CR
State of Alaska v. Jones	No. 3KN-94-1131-CR
State of Alaska v. McKeirnan	No. 3KN-94-1299-CR
State of Alaska v. Sanders	No. 3KN-94-1350-CR
State of Alaska v. Wood	No. 3KN-94-1377-CR
State of Alaska v. Meadows	No. 3KN-94-1388-CR
State of Alaska v. McCarthy	No. 3KN-94-1671-CR
State of Alaska v. Heisey	No. 3KN-94-1671-CR
State of Alaska v. Spiroski	No. 3KN-94-1682-CR
State of Alaska v. Burke	No. 3KN-94-1692-CR
State of Alaska v. Wortham	No. 3KN-94-1766-CR
State of Alaska v. Denham	No. 3KN-94-1781-CR
State of Alaska v. Garrison	No. 3KN-94-1786-CR
State of Alaska v. Wortham	No. 3KN-94-1793-CR
State of Alaska v. Blank	No. 3KN-94-1796-CR
State of Alaska v. Crosby	No. 3KN-94-1802-CR
State of Alaska v. Walterman	No. 3KN-94-1807-CR
State of Alaska v. Leslie	No. 3KN-94-1818-CR
State of Alaska v. Phares	No. 3KN-94-1826-CR
State of Alaska v. Laughridge	No. 3KN-94-1851-CR
State of Alaska v. Reid	No. 3KN-94-1853-CR
State of Alaska v. Wicker	No. 3KN-94-1854-CR
State of Alaska v. Jordan	No. 3KN-95-5-CR
State of Alaska v. Thompson	No. 3KN-95-40-CR
State of Alaska v. Hopper	No. 3KN-95-74-CR
State of Alaska v. Piro	No. 3KN-95-99-CR
State of Alaska v. Smith-Berg	No. 3KN-95-178-CR
State of Alaska v. Gibson	No. 3KN-95-214-CR

State of Alaska v. Hopper	No. 3KN-95-312-CR
Muni. of Anchorage v. Beck	No. 3AN-M94-08096-CR
Muni. of Anchorage v. Choquette	No. 3AN-M94-08561-CR
Muni. of Anchorage v. Hoff	No. 3AN-M94-09330-CR
Muni. of Anchorage v. Igtanloc	No. 3AN-M94-07412-CR
Muni. of Anchorage v. Ketchum	No. 3AN-M94-08080-CR
Muni. of Anchorage v. Konahok-McVey	No. 3AN-M94-09333-CR
Muni. of Anchorage v. Jennings	No. 3AN-M94-08391-CR
Muni. of Anchorage v. Johnson, Jr.	No. 3AN-M94-07831-CR
Muni. of Anchorage v. Murray	No. 3AN-M94-09036-CR
Muni. of Anchorage v. Shade	No. 3AN-M94-04667-CR

IDAHO

Fifth Judicial District Court

State of Idaho v. Bendele	No. CR 94-01200 M
State of Idaho v. Bumgardner	No. CR 94-00936
State of Idaho v. Cabanas	No. CR 94-02113 D
State of Idaho v. Haskell	No. CR 94-02707
State of Idaho v. Trevino	No. CR 94-3663

Sixth Judicial District Court

State of Idaho v. Barker	No. MC-942565-C

KANSAS

District Court of Barton County

City of Great Bend v. Sandy	No. 94-MC364

OHIO

Court of Appeals of Ohio

State of Ohio v. Gustafson	No. 94-CA-232

Warren Municipal Court

State of Ohio v. Postlethwait and 42 other defendants	No. _____

Franklin County Municipal Court

State of Ohio v. Ackrouche	No. M 941OTFC-145054

NEW YORK

Oswego City Court

State of New York v. Hamilton, Jr.	No. _____
State of New York v. Baptista	No. _____

VIRGINIA

U.S. District Court for the Eastern District of Virginia

United States v. Johnson	No. 95-76-M
United States v. Imngern	No. 95-266-M

The General District Court of Orange County

Commonwealth of Virginia v. Hess	No. T95-1367
	No. T95-1368
Commonwealth of Virginia v. Kanter	No. T95-0567
Commonwealth of Virginia v. Galyen	No. T95-0133
Commonwealth of Virginia v. Jackson	No. T95-0611
Commonwealth of Virginia v. Washington	No. T95-0764
Commonwealth of Virginia v. Jones	No. T95-1122
Commonwealth of Virginia v. Unkle	No. T95-0612
	No. T95-0613
Commonwealth of Virginia v. Dearing	No. T95-1366

WASHINGTON

Municipal Court for the City of Seattle

City of Seattle v. Savaria, et al.	No. 21556

CASES IN WHICH COURTS
HELD SEPARATE CRIMINAL PROSECUTIONS
NOT BARRED BY DOUBLE JEOPARDY CLAUSE

DELAWARE

Newcastle County Superior Court

State of Delaware v. Schwander 1995 WL 4123248

FLORIDA

Second District Court of Appeal

Espey v. State of Florida 611 So.2d 1260

Fifth District Court of Appeal

State of Florida v. Davidson 656 So.2d 223

HAWAII

Supreme Court of Hawaii

State of Hawaii v. Higa 897 P.2d 928

IOWA

Supreme Court of Iowa

State of Iowa v. Funke 531 N.W.2d 124

MAINE

Supreme Judicial Court of Maine

State of Maine v. Savard 659 A.2d 1265

MINNESOTA

Minnesota Court of Appeals

State of Minnesota v. Hanson 532 N.W.2d 598

NEBRASKA

Nebraska Court of Appeal

State of Nebraska v. Young 530 N.W.2d 269

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November __, 1995

(3)

Supreme Court, U.S.
FILED
DEC 22 1995
CLERK

No. 95-822

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

RICHARD W. COSSEY, Petitioner

VERSUS

STATE OF LOUISIANA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS

OPPOSITION OF THE STATE OF LOUISIANA TO PETITION BY RICHARD W. COSSEY FOR WRIT OF CERTIORARI

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United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361(1984).....3

The State of Louisiana respectfully submits the following brief in opposition to the petition for Writ of Certiorari filed by the petitioner, Richard W. Cossey.

STATEMENT OF THE CASE

Petitioner, Richard W. Cossey, was arrested on February 22, 1994, for Driving While Intoxicated, third offense. At the time of his arrest, petitioner was transported to the Lake Charles Police Department where a breathalyzer test was conducted. The test indicated a Blood Alcohol Concentration (BAC) in excess of .10%, specifically .212g%BAC.

As a result of his arrest, and in accordance with Louisiana's Implied Consent Law, La. R.S. 32:667 and 668, the petitioner's license was seized and a temporary receipt of his license on a form approved by the Department of Public Safety and Corrections was issued in its place. This temporary receipt provides and serves as notice to the person that he has not more than ten days from the date of arrest to make a written request to the Department of Public Safety and Corrections for an administrative hearing in accordance with the provisions of La. R.S. 32:668.

After a civil administrative hearing, conducted by the Louisiana Department of Public Safety before an administrative law judge, petitioner was found to be a third time DWI offender and the Department of Public Safety suspended petitioner's driver's license for one year. Thereafter, on August 16, 1994, the State of Louisiana, Parish of Calcasieu, proceeded with its criminal action against the petitioner by filing a Bill of Information charging him with Driving While Intoxicated, third offense, a violation of La. R.S. 14:98.

On October 26, 1994, petitioner filed a Motion to Quash the criminal action on the ground that the State's prosecution subjected him to double jeopardy.

After a hearing on February 22, 1995, the trial court denied the defendant's motion on February 24, 1995. On review, the Third Circuit Court of Appeal denied the defendant's writ application, finding no error in the trial court's ruling. State v. Cossey, La. App. 3 Cir. No. K95-515, May 4, 1995. Thereafter, on September 22, 1995, the Louisiana Supreme Court denied the petitioner's application for writ of review without reasons. State v. Cossey, La. No. 95-KK-1344, September 22, 1995.

Petitioner now applies to this Honorable Court for a Writ of Certiorari. The State of Louisiana opposes petitioner's writ application because our state law is settled in this area and does not violate any federal constitutional mandates.

In his application, petitioner alleges two reasons for granting a Writ of Certiorari.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT IN *UNITED STATES V. HALPER, AUSTIN V. UNITED STATES, AND DEPT. OF REVENUE OF MONTANA V. KURTH RANCH, INC.*, AS WELL AS DECISIONS OF OTHER COURTS, WHICH RECOGNIZE THAT A CIVIL SANCTION THAT DOES NOT SOLELY SERVE A REMEDIAL PURPOSE BUT ALSO SERVES EITHER RETRIBUTIVE OR DETERRENT PURPOSES IS "PUNISHMENT" FOR DOUBLE JEOPARDY PURPOSES.

Both the State and Federal constitutions protect against double jeopardy in three distinct situations, which are to prevent: 1) a second prosecution for the same offense after acquittal; 2) a second prosecution for the same offense after conviction; and 3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); La. Const. Art. I, Section 15; U.S. Const. Amend. 5. See also, Butler v. Department of Public Safety and Corrections, 609 So.2d 790 (La. 1992). At issue in the instant case is multiple punishments for the same offense.

From Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938), to United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), this Court's test for all civil penalty cases was strict statutory construction. These cases along with Rex Trailor Company v. United States, 350 U.S. 148, 76 S.Ct. 219, 101 L.Ed.149 (1984), and United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984), were instrumental in developing the double jeopardy law in the civil remedial context.

The crux of these cases is that a government may impose a criminal and a civil sanction with respect to the same act or omission without violating double jeopardy guarantees. However, the civil sanction must not be "so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." United States v. Halper, supra, citing Helvering v. Mitchell, supra.

The Louisiana Supreme Court applied the above standard in Butler, supra. Based on this Honorable Court's jurisprudence, the Louisiana Supreme Court found Louisiana's license suspension procedure to be a civil measure, not a punitive measure. The Louisiana Supreme Court based its decision on the fact that a license revocation or suspension proceeding does not involve a loss of liberty or threat of incarceration. Butler, at 796. In addition, the Louisiana Supreme Court found that "a driver's license suspension is a remedial measure which attempts to protect society from the hazards posed by drunk drivers by removing the driving privileges of those who have been convicted of driving while intoxicated." Butler, at 796. As a result of the suspension, the motorist suffers no loss of liberty, no incarceration or fine, but merely forfeits the privilege of driving on public highways of the state.

The second issue addressed by the Louisiana Supreme Court in Butler, was whether the civil remedial measure of a post-DWI arrest license suspension is of sufficient deterrent force and impact so as to violate the constitutional proscription against multiple punishments for the same offense.

This Honorable Court has previously considered whether and under what circumstances a civil penalty constitutes punishment for the purpose of the Double Jeopardy Clause of the United States Constitution. This Court has found that only in "rare cases" does a civil penalty, imposed after criminal sanctions, implicate the Double Jeopardy Clause of the United States Constitution.

In United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), the manager of a medical laboratory convicted of submitting 65 false claims for reimbursement under the federal criminal false claims statute. Based on the facts established in the criminal proceeding, the federal government sued Halper under the federal civil False Claims Act. The district court refused to apply the statutory civil penalty on double jeopardy grounds and limited the government's recovery to double the actual damages plus its costs. This Honorable Court held that this was a **"rare case"** in which the imposition of the full statutory penalty would violate the Double Jeopardy Clause of the Fifth Amendment. This Court reasoned that the disparity between the government's actual costs in investigating and prosecuting Halper's false Medicare claims and the actual damage he caused the Medicare program would render the full civil penalty a second punishment. In reaching this conclusion, this Court stated that "a civil as well as a criminal sanction constitutes punishment when the sanction as applied to the individual case serves the goal of punishment and further that under the Double Jeopardy Clause a defendant who already has been punished in the criminal

prosecution may not be subjected to an additional civil sanction to the extent that the second sanction has not been fairly characterized as remedial, but only as a deterrent or retribution."

In Butler, the Louisiana Supreme Court found that Butler's license suspension was temporary (90 days), the last 60 days of which he would be able to obtain a restricted license. Furthermore, Butler's license suspension bears a rational relationship to the legitimate governmental purpose of promoting public safety on Louisiana highways. Therefore, the Louisiana Supreme Court found the statutorily authorized license suspension to be not so divorced from its intended remedial goal so as to amounts to a second punishment for the same offense in violation of double jeopardy.

In the instant case, the petitioner's license was suspended for one year. Petitioner's suspension differs from the suspension in the Butler decision because petitioner has two prior DWI convictions. La. R.S. 32:667 provides that the suspension period is one year for second and subsequent violations occurring within five years of the fist violation. Through this statute, our state legislature has expressed its concern with the danger that multiple offenders cause to other motorists.

Based on the above and foregoing, it is the State's position that the defendant is not subjected to a second punishment for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

Petitioner argues in his brief that the above decision by the Louisiana Supreme Court is inconsistent with more recent decisions by this Court. Specifically, petitioner cites Austin v. United States, 509 U.S._____, 113 S.Ct. 2801 (1993) and Dept. of Revenue of Montana v. Kurth Ranch, Inc., 549 U.S._____, 144 S.Ct. 1937 (1994). It is the State's position that these cases, dealing with the Eighth Amendment's excessive fines clause and asset forfeiture laws, have no bearing on the constitutionality of an administrative suspension of a person's driving privilege for multiple DWI convictions.

II. A DECISION BY THIS COURT IS VITAL TO THE ADMINISTRATION OF THE CRIMINAL JUSTICE SYSTEM. OVER ONE MILLION DWI ARRESTS OCCUR EACH YEAR. NUMEROUS CASES ARE PENDING IN COURTS THROUGHOUT THE COUNTRY IN WHICH THE ISSUE PRESENTED IN THIS APPLICATION HAS BEEN RAISED. A DECISION BY THIS COURT IS NECESSARY TO PROVIDE UNIFORM GUIDANCE ON THE APPLICATION OF THE DOUBLE JEOPARDY CLAUSE TO CIVIL AND CRIMINAL DWI CASES.

The State of Louisiana submits to this Honorable Court that the law in this area is not uncertain in Louisiana. As explained above, Louisiana has a very recent State Supreme Court decision addressing this issue under both the federal constitution and our state constitution. In that decision, the Louisiana Supreme Court followed jurisprudence established by this Court.

The State submits to this Honorable Court that the present issue has already been decided correctly in Louisiana. Therefore, the State opposes petitioner's Writ of Certiorari.

CONCLUSION

Based upon the above and foregoing reasons, the State of Louisiana respectfully submits that there was no error in the ruling of the Louisiana Supreme Court. Therefore, the application for Writ of Certiorari filed on behalf of the petitioner, Richard W. Cossey, should be denied by this Honorable Court.

Respectfully submitted,

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